

No. 83-672

Office - Supreme Court, U.S.

FILED

JAN 16 1984

ALEXANDER L. STEVAS.
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

FREDERICK E. ALTHISER, *et al.*,
Petitioners,

v.

NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, *et al.*,
Respondents.

REPLY BRIEF AND SUPPLEMENTAL APPENDIX

RICHARD R. ROWLEY (Counsel of Record)
ROWLEY, FORREST AND O'DONNELL, P.C.
MARK T. WALSH, Jr., Of Counsel
90 State Street
Albany, NY 12207
(518) 434-6187
Counsel for Petitioners

Dated: January 13, 1984

i.

Parties.

A full listing of all parties appears at pages ii and iii of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, now on file in the Office of the Clerk of the Supreme Court of the United States.

Table of Contents.

	Page
Parties	i
Statement	1
Argument	1
Title VII policy	1
State law rights and the right to a hearing	5
Conflict with other circuits	7
Kirkland respondents	9

TABLE OF AUTHORITIES.

CASES:

EEOC v. Ford Motor Co., 73 L.Ed. 2d 721, 737-38 (1982)	7
W. R. Grace & Co. v. Local 759, 76 L Ed 2d 298, 310 (1983)	2, 3, 4, 8
E.E.O.C. v. Safeway Stores, Inc., 714 F 2d 567 (5th Cir. 1983)	2, 8
United States v. City of Miami, 644 F 2d 435, 451-52 (5th Cir., 1981) (<i>en banc</i>) (Gee, J., <i>concurring in part</i> <i>and dissenting in part</i>)	2, 7, 8
Cassidy v. New York City Dept. of Corrections, 95 AD2d 733 (1st Dept. 1983)	5

iii.

	Page
Donofrio v. Hastings, 60 AD2d 989 (4th Dept., 1978) . . .	14
Frank v. Tishelman, 72 Ad2d 604 (2nd Dept. 1979)	5
Yates v. Greco, 85 AD2d 817 (3rd Dept. 1981)	5, 6
OTHER AUTHORITY:	
The Supreme Court, 1982 Term, 97 Harv. L. Rev., 269- 78, 273 (1983)	1, 3

No. 83-672

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

FREDERICK E. ALTHISER, *et al.*,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Respondents.

**Reply Brief in Support of Petition for a Writ of Certiorari
to the United States Court of Appeals for the Second
Circuit.**

Statement.

This reply brief is submitted to address arguments raised in the respondents' briefs in opposition. The State respondents' brief will be identified to as "SB", and the Kirkland respondents' brief as "KB". Numbers following will refer to the page number of the designated brief. The supplemental appendix will be similarly identified as "SA". All other references are as set forth in the petition.

Argument.

Title VII policy.

Respondents argue that acceptance of the petitioners' view would sound the "death knell for voluntary compliance and Title VII settlements". (KB12) Petitioners do not dispute that Ti-

tle VII policy favors settlement; as respondents themselves point out, petitioners have been favorably disposed to the idea of settlement of this case. (KB4, SB6)¹ However, Respondents' assertion that the policy in favor of settlement of Title VII claims supports their actions here must be unavailing as Title VII does not favor settlement at all costs. *E.E.O.C. v. Safeway Stores, Inc.*, 714 F 2d 567 (5th Cir. 1983); *United States v. City of Miami*, 644 F 2d 435, 451-52 (5th Cir., 1981) (*en banc*) (Gee, J., concurring in part and dissenting in part).

Settlement is favored because harmonious labor and race relations in the workplace will be fostered thereby. These goals will not be realized where, as here, interested and affected parties are not participants in the settlement process nor parties to the agreement.² In exchange for the Kirkland respondents' agreement to forego back pay claims, the State relinquished nothing of its own. Instead, it gave up that which it did not own, petitioners' civil service, contract and equal protection rights. This type of agreement is "unlikely to further true conciliation between all interested parties", *W.R. Grace & Co. v. Local 759*, 76 L Ed 2d 298, 310 (1983) ("*Grace*").

As petitioners argued below, none of the employees should suffer if the employer is the wrongdoer.³ Even though the underlying premise for the State's action is its own illegality, the State finds itself in a most comfortable position. It can confer a benefit upon minorities in order to further "New York State's policy" (SB26) *at no cost to itself*.⁴ Instead, petitioners bear the entire burden of furthering a "policy" which is detrimental to

¹While petitioners were welcome parties to one settlement conference, once their interests diverged from those of the respondents, they were excluded from further participation, and the settlement was submitted to the District Court without their knowledge.

²Respondents' citation to *Carson v. American Brands*, 450 US 79 (1981) draws attention to the gaps in their argument when it is considered that the settlement agreement in that case was supported by all parties. 606 F 2d 420, 427 (4th Cir. 1979) (*en banc*).

³Of course, the question of whether the employees should suffer for the wrongs of the employer presupposes a culpable employer. Here, the State has not been adjudged a wrongdoer and refuses to admit any wrongdoing whatsoever.

their career interests. If the State wishes to rely upon a "constructive" admission of discrimination, settle with only one of two equally interested parties, displace petitioners from their "rightful place" on the eligible list and by-pass the required findings of discrimination, it must assume the full cost of the remedy and compensate petitioners for any loss they suffer.⁵ By perceiving the case as a confrontation between two groups of innocent employees with legitimate competing claims and assuming that one group would have to suffer as a result of the State's action, the courts below took an unnecessarily narrow view of the problem.

Commentators have noted that this Court's opinion in *Grace*, *supra*, "may signal a more creative approach to the dilemma". *The Supreme Court, 1982 Term*, 97 Harv. L. Rev., 269-78, 273 (1983). That note, which focuses upon the conflict between seniority and consent decrees containing race conscious relief states that the *Grace* alternative of directing the employer to compensate white employees affected by the consent decree places the burden upon the "guilty" party in accord with "popular notions of reparative justice", *Id.* at 275, and continues:

"The *Grace* formula would be even more appropriate in cases that, like *Boston Firefighters*, involve public sector

"The State takes the further position that because "the Second Circuit has not yet held an examination to be job-related where the examination had an adverse impact and where the validation was a content validation" (SB19, n.*), an attempt to defend this test would be too difficult and expensive. The State cites other "courts" [striking] down of selection procedures where alternatives existed which had less adverse impact" (SB20) to further support this claim. This contention must be rejected as another tests' invalidity is irrelevant to the test here and the principal that the enforcement of constitutional rights cannot be subject to financial consideration. *Goldberg v. Kelly*, 397 US 254, 263, 266 (1970); *Gideon v. Wainwright*, 372 US 335, 344 (1963); *Todaro v. Ward*, 565 F 2d 48, 54 n.8 (2nd Cir., 77).

"The Courts have recognized that the formulation of remedies in cases affecting identifiable career civil servants seeking promotion requires greater caution than the extreme care needed in the formulation of remedies in entry level hiring cases. See, e.g., *Guardians Association v. Civil Service Comm.*, 630 F 2d 79, 108 n.26 (2nd Cir., 1980) *cert. denied* 452 US 940 (1981).

employees. The enterprise liability rationale for making the employer bear the cost of preserving both vested seniority rights and integration goals is most forceful in a public employment setting: the taxpayers who will ultimately share the burden were parties to the past discrimination insofar as they tacitly condoned it by electing the officials who practiced it. Moreover, just as the public, by merely claiming fiscal duress, would not be permitted to condemn property or overrun individual property rights without compensating the owner, neither should the public be permitted to confiscate vested seniority rights without compensation.

From a practical perspective as well, a government employer is in a better position to provide a *Grace* remedy. Although such reallocations may require cutting back services that taxpayers want, the equity of demanding a relatively minor sacrifice from many in order to avoid imposing a crushing cost on a few is self-evident." *Id.* at 275-76.

Here the cost to the State of compensating innocent whites for the furtherance of its own purpose would be a *de minimus*. The rationale behind placing the burden upon the employer carries greater weight here where there has been no finding or admission of discrimination by the employer but instead voluntary State action the reasoning of the Court of Appeals constitutes a repudiation of the more enlightened approach of *Grace*.

Both the Title VII policy in favor of settlement as well as harmonious labor and race relations would be promoted by adoption of the *Grace* alternative rather than the agreement approved by the courts below as a standard for such cases. This approach of placing the burden upon the employer will encourage efforts to insure the validity of its selection procedures. To permit approval of the settlement is to remove all incentive to develop lawful selection devices, as it permits the State to resolve its problems by compromising the rights of third parties without cost to the State.

The contention that petitioners seek to undermine Title VII policy by forcing a full trial on the merits is similarly without

merit as petitioners do not contend that a full trial on the merits is necessary in all such cases. However, if, under the facts of a particular case, a trial on the merits is the most appropriate method of making the constitutionally required finding of discrimination, then a trial will be necessary. Adherence to these important constitutional principles must be maintained.

State law rights and the right to a hearing.

"[A] person whose name appears on an eligible list gain[s] *an enforceable right to be considered for an available position*. So long as a list is in force, promotions can be made only from the list and then only [pursuant to N.Y. Civ. Serv. L. §61(1)] . . . Not only is appearance on an eligible list important, but . . . one's place on a list could affect quite significantly one's chances to be considered for promotion. *Due process dictates that notice and an opportunity to intervene be given to [such persons]*." *Cassidy v. New York City Dept. of Corrections*, 95 AD2d 733, 734-35 (1st Dept. 1983). (Emphasis supplied, citations omitted.)

Respondents' assertion that petitioners have no right to defend the validity of the test because New York Law gives no such right is erroneous. New York Law gives petitioners a right to a hearing to prove that the basis for the State's failure to appoint in rank order was unlawful and impermissible.⁶ See, e.g., *Yates v. Greco*, 85 AD2d 817 (3rd Dept. 1981); *Frank v. Tishelman*, 72 AD2d 604 (2nd Dept. 1979); *Donofrio v. Hastings*, 60 AD2d 989 (4th Dept. 1978). As under Federal Law,

⁶Along these lines, petitioners note that the State, like the Court of Appeals, leaves unexplained the New York Court of Appeals holding that "each competitive civil servant does have the right to be promoted in accordance with his placement on the promotional list resulting from such an examination". *Schuyler v. Department of Personnel*, 39 NY 2d 851 (1976), aff'g 47 AD 2d 948 (2nd Dept., 1975) (Petition 21). The State does now concede that the test was "content validated" and is *at least* content valid (SB 19, n.*). Similarly significant is the Kirkland respondents concern about "the existence of defense depositions in the record" (SA 11) and about being forced to assume what they themselves characterize as the "*uncertainties of litigation*" (KB 12).

New York Law provides that race is an impermissible basis for refusing to consider a person on an eligible list. N.Y. Const. Art. I §11; N.Y. Exec. L. §296. Only if a compelling governmental interest is served is the racially based deviation from the eligible list permissible. Petitioners have the absolute right under New York Law to prove that the deviation is impermissible. This is so regardless of the difficulty of such proof. *Yates v. Greco, supra*; *Donofrio v. Hastings, supra*. Here, such right allows petitioners to be heard on the issue of whether the test is job-related.

The State's contention that the settlement does not contravene New York's merit and fitness principles on the ground that there has been no change in the determination that all on the eligible list meet the requirements is omissive; they fail to mention that in certifying the list they made a determination of *relative* merit and fitness not only merit and fitness generally. *See, generally* N.Y. Civ. Serv. L. §61(1). The assertion that the competitiveness requirement is fulfilled because "the zones, devised by a statistical formula, are an objective standard for measuring the results of the examination" (SB22), is flawed. As set forth in the petition (Petition 5-6, n.4) and as admitted by the Kirkland respondents (KB6, n.4), the zones are not being used.' Under those circumstances and because of the total disregard of the "rule of three", N.Y. Civ. Serv. L. §61(1), the competitiveness requirement has been sidestepped. Petitioners disagree with the State's interpretation of the "rule of three" (Petition 20-24). However, to demonstrate the clear violation of the rule even under the State's broad interpretation of the rule that interpretation will be used.

The four point "zone" structure "deems" all candidates to be of equal fitness for promotion. As a consequence any person with any of the nine different half point ratings within each zone are "deemed" to be equally fit. On the State's theory a promotion may be offered to anyone with a rating equal to that of the third highest ranking person. Pursuant to that theory, if the top three on the list each had a different rating, the State could appoint either of the top two or anyone with a rating equal to that of the third. That situation presents the largest permissible

range of selection (zone): a 1.5 point range. If any of the top three had the same score the largest permissible range of selection would be reduced to one point and if the top three had the same rating, they would have to choose someone within that same half point rating. The establishment of a 4.0 point zone impermissibly expands the lawful range of selection and thus violates New York Civil Service Law's "rule of three" and hence the preservation of benefits clause of the collective bargaining agreement (Petition 20-24).

The contention that seniority plays no role in the promotional process ignores the facts. Seniority credits equaling one full point on the test are granted for each five years of service or fraction thereof with the Department. Petitioners average over 16 years of service and hence average four seniority credits. The imposition of a minority preference within a four-point range has cancelled out the seniority credits earned by petitioners. Diminishment of the petitioners' seniority rights on the basis of only a *claim* of discrimination is intolerable. *EEOC v. Ford Motor Co.*, 73 L.Ed. 2d 721, 737-38 (1982).

In addition, the relative preference granted to minorities over whites determines "time in title" seniority which in turn determines a great number of rights including priority in layoff situations, bidding for jobs, shifts and job location as well as certain prerequisites of employment such as days off, vacation schedules and preference with regard to overtime work. Thus, far from being an inconsequential factor, seniority both affects and is affected by the promotional process.

Conflict with other circuits.

The decision of the Court below conflicts with *United States v. City of Miami*, *supra*. Respondents' claim that *Miami* permits a race conscious remedy without a finding or admission of liability is omisive. The Fifth Circuit modified the decree by deleting those portions which conflicted with the rights of the union. Based on its holding that "a party potentially prejudiced by a decree has a right to a judicial determination of the merits of its objection," *Id.* at 447. The Court remanded explaining

that the contested relief could be awarded only if the plaintiff "proved that discrimination, 'the necessary predicate for relief,' had taken place." *E.E.O.C. v. Safeway Stores, Inc.*, 714 F 2d 567, 578 (5th Cir. 1983). In *Safeway* the Fifth Circuit relying upon *Miami, supra*, and *Grace, supra*, reached a similar result stating: "If the *E.E.O.C.* seeks a remedy which would infringe upon the rights of a third party, it cannot rely upon its 'agreement' with another party to do so. Rather it must demonstrate the propriety of such relief in a judicial proceeding at which the third party is allowed to present its evidence and voice its objection." *Id.* at 579-80.⁷

Similarly and in contrast with the Court below, the Fifth Circuit rejected the argument that because the conflict between the racial preference and the rights governing the employment relationship was "less pronounced than in earlier cases," *Id.* at 578, the agreement could stand. In refusing to recognize "gradations in the rights of a party to due process," *Id.* at 578, the Court held that the settlement could not "be imposed upon the employees of the company over the [third parties'] protest without a trial on the merits." *Id.* at 579. The conflict with the court below is apparent when it is considered that neither the courts below nor the parties contend that petitioners have no protectable interest, nor assert that the harm to petitioners is *de*

⁷Any suggestion that *E.E.O.C. v. Safeway Stores Inc.*, *supra*, was inconsistent with the *en banc* ruling in *Miami, supra*, was put to rest by the Fifth Circuit's denial of the petition for a rehearing *en banc* in that case. 719 F 2d at 677 (5th Cir. 1983). In addition, this case is unlike *Bratton v. City of Detroit*, 704 F 2d 878 (6th Cir., 1983) *cert. denied* 52 USLW 3499. In *Bratton*, the Court had a record which was "replete with evidence to support the district court's conclusion that the Board of Police Commissioners was correct in finding that the Detroit Police Department had employed a consistent, overt policy of intentional discrimination against Blacks in all phases of its operations. [The District Judge] conducted a lengthy trial . . . and made comprehensive written findings of past discrimination dating as far back as . . . 1943." 704 F 2d at 888. This historical data was mostly undisputed and is outlined at 704 F 2d at 888-890.

In contrast, the instant case is not premised upon a history of past discrimination. (Petition 3, n.1) Respondents do not dispute this. The sole transaction upon which this settlement agreement is premised is the test.

minimus; instead, terms such as "not overly oppressive" (29a), "some detriment" (21c), "modest" (14c, SB19) "least detrimental effect on interests of non-minority candidates" (31a), and "without substantially burdening non-minorities" (KB7), are used to describe the extent of harm suffered by petitioners and used by the Second Circuit to justify the holding that a court's subjective view of the importance of third parties' rights will govern gradations of a right to be heard. The conflict is direct and should be resolved.

Kirkland respondents.

The Kirkland respondents have attempted to transform the mere statistical disparity into what they term "overwhelming evidence of discrimination". (KB13) Lamentably, but predictably, the Kirkland respondents have chosen to infect the important genuine issues addressed by the courts below with matters which the courts specifically refused to consider. They refer to an affidavit by a man who claims to be an expert who states in conclusory fashion that certain unspecified questions in the test were not job-related. In addition, the Kirkland respondents cite the petitioners' failure "to proffer any evidence to support either the validity of the exam or the use of rank-ordering", (KB9), in support of their cause. Both contentions misrepresent the proceedings below. Unfortunately, these misrepresentations require the addition of a supplemental appendix consisting of the transcript of the proceedings where the District Court made clear that it would not consider these matters.

The District Court directed that the settling parties submit briefs to support the settlement and Petitioners were to reply. (SA7) The Kirkland respondents, however, chose to submit an affidavit from a man named Outtz (Hoots in the transcript and appendix) who claimed to be an expert. (SA2) In response, petitioners sought to have an expert review the test to evaluate whether or not it was job-related and to submit an affidavit in response. (SA6-7) That request was opposed by the respondents on the ground that "the State has taken the position and the plaintiffs have taken the position that we can settle this case without any finding of invalidity on the part of the exam." (SA10-11) The Court asked the Kirkland respondents what they were relying upon for approval of the settlement. "Your basic

motion . . . is the question of the job-relatedness of this exam that was given is not something that is to be litigated in connection with the settlement." (SA11) The Kirkland respondents answered "I think that is absolutely correct, Your Honor. I think the law is clear on that." (SA11) The District Court then made explicit that it would not try the issue of job-relatedness on affidavits but instead would have a trial if it determined that the question of job-relatedness of the test was an issue. (SA12) Petitioners again expressed their concern that if the affidavit of the claimed expert were included in the record, one of the parties might, as has happened here, some day attempt to convince a court to rely upon that affidavit and accept that as a "record fact" conceded by all parties as if it were a matter all parties had an opportunity to address and a matter adduced in the adversarial context. (SA13) The Court replied that the record would be absolutely clear that there was not any waiver of the right to rebut this claimed expert and that the Court would not tolerate the determination of the issue of job-relatedness by reliance upon one affidavit or another. (SA17)

The attempt to introduce this matter at this Court constitutes a *sub silentio* recognition by these celebrated discrimination attorneys that the statistics alone are an insufficient predicate for the imposition of a race-conscious remedy in the public sector. When stripped of these matters respondents' claims of "overwhelming evidence of discrimination" (KB9) are, in reality, only statistics showing a failure to achieve a representative percentage of minorities at each grading level of the examination and no more. The important question of whether that is sufficient to impose a race-conscious remedy is what is before this Court.

Dated: January 13, 1984

Respectfully submitted,

RICHARD R. ROWLEY (Counsel of Record)
 ROWLEY, FORREST AND O'DONNELL P.C.
 MARK T. WALSH, Jr. (Of Counsel)
 Attorneys for Petitioners
 90 State Street
 Albany, New York 12207
 (518) 434-6187

SA1

Transcript of Proceedings Held on October 14, 1982.

(1) UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

EDWARD L. KIRKLAND, *et al.*,

Plaintiffs,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, *et al.*,

Defendants.

82 Civ. 295

New York, New York
October 14, 1982
3:40 p.m.

Before:

Hon. Thomas P. Griesa, District Judge.

Appearances:

O. Peter Sherwood, Esq., Attorney for plaintiffs.
Robert Abrams, Esq., Attorney General, State of New

York. By: Barbara B. Butler, Esq., Ann Horowitz, Esq., Assistant Attorneys General.

Beck, Halberg & Williamson, Esqs., Attorneys for McClay, *et al.* Intervenor. By: Herbert B. Halbert, Esq., Roman Beck, Esq., of Counsel.

(2) Rowley, Forrest & O'Donnell, P.C., Attorneys for Althiser Intervenor. By: Richard Rowley, Esq., Mark Walsh, Jr., Esq., Ronald G. Dunn, Esq., of Counsel.

The Court: I have gotten a memorandum from the plaintiffs and a memorandum from the defendants, and the next question is, what are the issues which the intervenors wish to deal with and how. Presumably it will be a modest brief, and that's all there is to it, there is really no problem. But if anybody is going to suggest anything other than that, submission of affidavits or factual hearing or anything like that, this is where we have to sort that out.

So, Mr. Rowley, I will start with you.

Mr. Rowley: Your Honor, I know you have already made your determination, but I again want to go on the record objecting to the limited nature of the intervention that has been granted to us, because we have been trying to get into this case ever since June. And we have never made any agreement with the State or the plaintiffs on the settlement of this case about any racial quotas or zones or anything else. That much being said, we do not think that the plaintiffs and the State have complied with your directives (3) as of the 4th of October, your Honor.

Mr. Sherwood has seen fit to include with his brief as an appendix to it, an affidavit of the merits by a man Hoots, which clearly relates to the question of whether or not the examination is a valid examination. He then also has his own affidavit of facts, and since he has a brief dealing with the law, I take it his affidavit is supposed to be dealing with the facts as to the questions of the factual issues involved.

The State of New York has likewise taken a similar attack and has filed a brief, a short memorandum with an affidavit by a man named Velarie, I guess it is, and a Mr. Murphy, both of which go to the merits of this case.

Your Honor, we understood there were to be briefs, and that only. I think, very candidly, based upon what I read from the record of the last hearing it has been represented to you, for example, that there is a record in this case, that there is a record that includes depositions upon which you are going to be able to make determinations of fact and to approve or disapprove this purported settlement.

Today we went down, your Honor, if I may hand this up, to the Clerk's office of this court and got a certified copy of the docket. There are no depositions on (4) file in the Clerk's office of this court. There is no record at all here, your Honor. The record here is very clear—

The Court: Let's not quibble. If the depositions haven't been filed and they exist, I don't care whether they have been filed or not. They can be furnished to you.

Mr. Rowley: They have not been furnished to us. Never. And none of the other materials have been furnished to us. The only thing we have ever gotten we got from the Clerk's office ourselves. Under those circumstances, your Honor, it seems to us that the plaintiff and the State have realized at this point that they must provide you with some kind of a record of factual matters to show that this examination is not valid.

The Court: No, wait a minute. Let's not jump too far. At the risk of repeating something I asked at the earlier hearing which I take it was the 4th of October—

Mr. Rowley: That was the last one. The first one was the 29th of September.

The Court: It's my understanding that what has been submitted to me in support of the proposed settlement is nothing more than the settlement agreement. In other

words, there has not been submitted to me—prior to this latest briefing there was simply a submission of the (5) settlement agreement, right?

Mr. Sherwood: That's all that we presented to you in August, Judge. But it is true that before that there had been, I believe, a motion for a preliminary injunction—

The Court: I'm not talking about that, please.

Mr. Sherwood: That had facts associated with it.

The Court: We are accustomed in this court, when somebody moves for approval of a class action, to have a motion, and that motion consists of, obviously, but this is just the beginning, of the proposed settlement agreement. And then there is usually whatever materials the proponents of the settlement want to submit in support of the settlement. Usually that consists of one or more affidavits and a brief describing the reasons why the settlement is fair and reasonable. And those things exist so that they are on record available for anybody who wants to look at them and oppose or whatever they want to do.

Now, here, we really, it seems to me, didn't—and I think we have got to get the record straightened out here. You submitted a proposed settlement agreement without any motion papers in favor of it. And are these the papers you want to submit in favor of the motion? What is it that you say supports this settlement? And I will not—I don't want a vague record which consists of depositions here and (6) there, some past motions. There should be a record in support of this settlement.

Mr. Sherwood: Your Honor, what was submitted to you in, I believe, the beginning of September or the end of August was a stipulation of settlement together with a bare bones motion.

Without any affidavits, without law, etc. And that was sort of in response to our understanding from our July meeting that the Judge, that you would not want a great

deal of additions to the record, although that did not mean that you wanted nothing more than just a bare bones motion.

We came back before you the end of September and at that time our understanding was—I guess October 4, was that we were to submit to you the kind of things you are now talking about: the motion together with affidavits in support of the settlement. Those affidavits similarly go to the standards, dealing with the standards for approval of a settlement.

It is not intended to make out an—to litigate, we do not intend to litigate by affidavit the case on the merits, because the settlement law doesn't require that, Judge. But you do need to have some factual basis to go forward with an application for approval. And we have provided you with nothing more than that, Judge.

(7) The Court: Okay. So I now have, through your latest brief and the State's brief and the affidavits submitted in connection therewith, what you believe supports the settlement?

Mr. Sherwood: That's correct.

The Court: Okay.

Now going back to Mr. Rowley, where do we go from here?

Mr. Rowley: We did not understand, your Honor, from the meeting here on the 29th, and subsequently, although I wasn't here, I read the minutes on the 4th of October, that there were going to be any affidavits submitted by anyone. And we have been clearly told by your Honor on the 29th that we were not to submit anything without the Court's prior permission.

We have nevertheless prepared at least one affidavit; however, we have not gone into any extensive factual discussion in opposition to these factual affidavits that have been submitted by the State and by the plaintiffs.

And we think we are entitled to do that, your Honor, so that you may make—

The Court: There is one reason that I have put some limits on what papers you can file, and that is, I have gone into that amply already and I don't need to repeat. But (8) as far as Mr. Sherwood's papers and the State's papers, they are really, by the papers they are now submitting, they are filling in the gaps which existed before.

In other words, they have a complete set of papers now for all to behold, which constitutes their submission in favor of the proposed settlement.

So again, I asked you what you proposed to submit, so it isn't a matter of—you don't have to get strenuous or—I want to hear and I have an absolutely open mind about whatever you propose to submit to counter these proposals in favor of the settlement. I will reserve the right to, you know, limit it, but I want to hear what you want to submit.

Mr. Rowley: Your Honor, we have a brief—I shouldn't say entirely drafted because it is not. We have a draft of a brief partially completed at this point. We want to submit also an affidavit, it is thick, it is thick merely because it's a photostat of two collective bargaining agreements, along with a short affidavit which is only four or five pages long.

But the selective bargaining agreements are essential that you have them before you so that you know what is going to be taken away from people and what impact you are going to be having on people if you approve this settlement. (9) We think that that is imperative.

Now that I understand a little bit more clearly the affidavit picture, we may want to submit a further affidavit in response to the Hoots affidavit or the affidavits of the State.

We may want to submit an affidavit of an expert who doesn't agree with Mr. Hoots. And, very candidly, I don't

believe I can do that by the 18th. I had no idea that we were going to see an affidavit like that. Beyond that, Mr. Sherwood took a great deal of trouble to serve us papers on time, for which I thank him. The State did not.

Mr. Sherwood: Mine were on time.

Mr. Rowley: Yes, as a matter of fact they were. We didn't get the State's papers until the day after they were due.

The Court: I think you are correct, I asked Mr. Sherwood to submit a brief giving me the arguments on the framework within which I should view the settlement. I think that is specifically what I asked for. And then you were supposed to respond. So now perhaps the issues have broadened a little beyond what, you know, we contemplated when we were last together.

Again, I think it's not quite normal to ask an attorney to, you know, forecast exactly what he is going to (10) put in, but I would like to get an idea from you, you are going to submit a brief, you are also going to submit a short affidavit enclosing the collective bargaining agreement or agreements, and then you may want to submit some affidavit in response to the Hoots affidavit. Is that it?

Mr. Rowley: And possibly these two affidavits of the State, beyond that. But the affidavit will not be voluminous, I assure you of that.

The Court: Just as long as they stick on the issues which you have discussed in court and they don't have a lot of repetitious material, that's all I care about. That is my main objective, that we keep the paperwork sensible. When can you have your materials in?

Mr. Rowley: We have not, your Honor, at this point, seen the examination before trial which are referred to by Mr. Sherwood and which he represented last week were in the record. We searched for them, they were not there. We have not seen those things. Mr. Sherwood did not serve us

with copies of his brief that he served upon us, the affidavits in support by the individuals. We simply don't have them.

Mr. Sherwood: Not true.

The Court: Hoots you don't.

Mr. Rowley: No, we have. But he said individual affidavits were to be attached to Schedule A, were not attached (11) to what we have. We don't know what these individual employees have said. We may or may not want to respond to it, I don't know.

The Court: Where is this referred to?

Mr. Sherwood: It is referred to at the end of my affidavit. I did not submit them simply because I could not get them. I could just as easily strike that paragraph from my affidavit.

The Court: Just help me out. Where are you talking about?

Mr. Sherwood: In my affidavit, the next to last paragraph makes reference to some affidavits which I had intended to file from class members basically saying that they support the settlement. You already have in the record some letters. You don't really need that, Judge. It is just some—

The Court: It's totally unnecessary. It would not add anything.

Mr. Sherwood: Not a whole lot. It would be an affirmative statement from the plaintiffs' class—

The Court: Frankly, unless somebody objects, I assume that they support the settlement.

Mr. Sherwood: That's all it goes to, Judge.

The Court: I am just going to make a note that (12) no other affidavits are to be submitted.

Mr. Sherwood: I would consent to strike that paragraph.

Mr. Rowley: In respect to the next paragraph, 18, you talk about an Exhibit B, Racial Composition of the

Department of Correctional Services. That was not with the papers that we received either.

Mr. Sherwood: I asked the State for a copy of that and I have not gotten that yet, Judge. I'd like to be able to provide you with that so you know what the Department looks like.

The Court: All right.

Mr. Rowley: We can't very well respond until we know what to respond to.

Mr. Sherwood: What is there to respond to the composition of the department, Judge? Those are the facts.

The Court: When can you have that?

Mr. Sherwood: Let me ask.

(Pause)

Mr. Sherwood: I will be able to tell them by the end of the day, Judge. I don't know from the State yet.

The Court: Okay. I think that is not going to be something that will be a matter of major controversy that has to take voluminous work, so let us put that aside, and you (13) work out your schedule. Give me an idea of when you propose to submit your papers. Don't worry about those little incidental things we just talked about.

Mr. Rowley: When can we have the examination before trial?

Mr. Sherwood: Your Honor, with respect to the examinations before trial—

The Court: You are not relying on the EBT's for the settlement.

Mr. Sherwood: That's true, your Honor, but I'd like to say, for example, these other intervenors asked me for a copy. I have already provided it to them. Mr. Rowley has yet to ask me for a copy, and that's the only reason he doesn't have it.

Mr. Rowley: That doesn't answer the question about how soon can we have it.

Mr. Butler: We have copies in court and we can give them to him right now.

Mr. Rowley: Supplied.

The Court: It's usually a lot easier to ask the lawyers than to come to court for it.

Mr. Walsh: When I was in Albany I asked Miss Butler for them.

Ms. Butler: And you got them.

(14) Mr. Rowley: Thank you very much for your speedy delivery.

The Court: Thank you for your speedy request. It would have been a lot easier to ask them than to go to the Clerk's office here.

Mr. Rowley: We relied on the official record, your Honor. That's the only thing we can rely on.

The Court: Oh, come on. It is not. Everybody knows that depositions are frequently not filed. They are possessed by the attorneys. When do we get your papers?

Mr. Rowley: I think I need two weeks from tomorrow. To get the affidavits, I also have not seen, and I would request at this time the same materials that Mr. Hoots was provided with: the packets, etc.

Mr. Sherwood: Your Honor, we are certainly happy to provide, with one exception, your Honor, we are willing to provide Mr. Rowley with that information. I have an objection with respect to the amount of time. The one exception is that we have been provided a copy of the example itself. It is subject to a protective order. That protective order precludes us from giving it to anyone other than the experts and the lawyers for the plaintiffs.

Of course, if the State wants to permit you to have it, fine. I am subject to a protective order.

(15) Ms. Butler: The reason we object to doing that at this point is that your Honor has made it quite clear that the intervenors are not here to object to the validity of the

exam, and what I hear 90 percent of Mr. Rowley saying is that they are going to now spend their time, look at the exam, look at the deposition, all to go to whether or not this exam was valid or not. We already decided when we appeared in front of your Honor—excuse me, your Honor decided that the issue of the validity of the exam was not going to be litigated, and all the time that Mr. Rowley is asking for, all the material he is asking for, all relates to whether or not the exam was or was not valid.

The State has taken the position and the plaintiffs have taken the position that we can settle this case without any finding of invalidity on the part of the exam. And that's all we're going back to now today.

The Court: The thought I have at the moment, and let me test it out on you, I take it, Mr. Sherwood, that nothing you have submitted, none of the affidavits and none of the briefs goes to the merits of your claim regarding the job relatedness of the exam or the issue of whether it is or is not job-related? You don't get into the merits of that, right?

Mr. Sherwood: Your Honor, Mr. Hoots' affidavit (16) does touch on that question. The reason I did that, your Honor, was because of the existence of defense depositions in the record. I could just as easily exclude that portion of Mr. Hoots' affidavit.

The important thrust of his affidavit is that the new methods that we are talking about will be an improvement on the old. That doesn't go to job-relatedness of the old. It simply says that this is better, and we can deal with that.

The Court: Your basic motion—and I don't think you have waived it—is, your basic motion is the question of job-relatedness of this exam that was given is not something that is to be litigated in connection with the settlement.

Mr. Sherman: I think that is absolutely correct, your Honor. I think the law is clear on that.

The Court: What I would suggest, Mr. Rowley, is this: that if we are going to get into the question of job-relatedness, I assume we will have a hearing and take evidence, have a trial, you know, if you want to call it that. I assume that we will not be litigating the question of the job-relatedness of the exam on some brief affidavits. My point is that you should not, it will do you no good to try to get a lot of materials together and start arguing the question of job-relatedness at the present juncture. Because (17) I won't—if I am going to try that issue, I am not going to try it on a few affidavits submitted in this way. We'll have a trial.

What you should do is to respond to their proposals for settlement, pro or con, and I'm sure it is going to be con, make your arguments of law, whatever they are, in opposition to his points, and he has made numerous points, and I assume that perhaps you will disagree with his interpretations of the law and his numerous points, or at least some of them.

Then if one of the points you want to make is that "We want to challenge," or "We want to go into the question of job-relatedness of the test, the validity of the test," then you should brief why it is you are entitled to do that in this settlement juncture.

And if you win on that point, then we'll have a trial. If you don't, then you don't win. But I think my point is clear. This is the reason it should not take a long time. You respond to his points of law. He's presented his point about how the settlement should be handled, and he's presented the idea that there is no need or appropriateness in trying the issue of job-relatedness, and in all respects his settlement is fair and reasonable. You should respond to that, if you wish to do that.

(18) And on the question of job-relatedness, you can't, it isn't a matter of trying that issue on these papers. You tell

me why there should be a trial or a hearing or further proceedings. If that is your position. And that should relieve you of the need to undertake an exam of that issue on its merits now, because this is not the time to do that, and it should mean that you could have your papers in much earlier than you thought.

I would suggest a week from tomorrow.

Mr. Rowley: May I point out the real problems that I have with that?

The Court: Yes.

Mr. Rowley: You have in your own hands an affidavit from a man who claims to be an expert, and for all I know he is. He claims, among other things, having reviewed the document, he made the following conclusions—3808 was not based on job analysis—pages 5 and 6—your Honor, it is factual, it goes to job-relatedness, it goes to the validity of the test, and that's all this affidavit goes to, because you can't compare a new procedure as better than the old procedure without analyzing the old procedure and saying what's wrong with it. This is my problem, your Honor. I want to protect this record.

If there is a record here upon which the Court (19) at some juncture may in its wisdom say, "We have the affidavit of Mr. Hoots and Mr. Hoots says this and there is no contradictory material in the record and I accept it as conceded by the other parties," then I have no record.

And as long as that is before the Court, your Honor, I have to make serious and strenuous objection to the suggestion.

Mr. Sherwood didn't put it in there because he didn't think it was necessary.

Mr. Sherwood: May I respond, your Honor?

Judge, before you are a variety of interests. There are the interest of the settling parties, there are the interests of the intervenors. The extent to which each of the parties

can go into any particular issue depends on what their interests and what their status is. The settled law, and if you look at page 14 of my brief, indicates what is the interest of third-party objectors, the intervenors in this situation. Their interest, Judge, as selected by EEOC versus AT&T Company, 556-F SEC at the bottom of page 14, it is limited to the appropriateness of the remedy.

So while the main parties may talk about the issue of a prima facie case, etc., and that is what Hoots' affidavit goes to, their interest is limited to whether or not the remedy that is being imposed is one that impacts (20) adversely on their rights.

The Court: Yes, but it seems to me from your papers that isn't such a simple question. Because when you are talking about the—and you have paragraph after paragraph with lots and lots of citations, all of which cases I haven't begun to read, and with statements that don't make it nearly as simple as I thought it was going to be from what you said in court here the other day.

For instance, subparagraph C on page 15, the use of ratios, goals, timetables, and other race-conscious remedies to correct discrimination or underutilization and to implement affirmative action in areas such as recruitment, hiring, training, and promotion is not unlawful, unjustified, or inappropriate, whereas here they are reasonably related to the legitimate State goal of achieving equality of employment opportunity.

Now, that is a very big mouthful, and does a group of intervenors have a right to object that these measures are not reasonably related to the legitimate State goal of achieving equality of employment opportunity? If they have a right to object to that, then what is the boundary of their right to object that this is not a legitimate State goal of achieving equality of employment opportunity? Does that mean it is not foreclosed by your (21) statement, does it mean or

doesn't it mean that they can try to show that the test which is in question is perfectly good in and of itself as a means of achieving equality of employment opportunity?

I mean, I could go on and on with these paragraphs you have presented which do not have little simple questions which automatically and clearly forecloses going into the job-relatedness of the test.

Subparagraph D on page 16, the State may properly include provisions requiring affirmative action to rectify the effects of prior racial discrimination. Citation of five cases.

Do we have prior racial discrimination?

Is it relevant to the question of prior racial discrimination, whether the test is a valid test as far as race is concerned, or is discriminatory?

There is nothing in that paragraph which tells me anything about that. Frankly, your papers provide me a lot of verbiage and very little precision. You were more precise standing in court. But when it gets to putting something in writing, I get a lot of very vague, open-ended statements which will take, if you haven't done the work, somebody has got to do a lot of work to get them into precise terms in terms of this case.

(22) Mr. Sherwood: I thought that I had done that, your Honor. To the extent I failed to do that, I apologize. But let me say that the question of whether their interest here, and I think I state that in the brief, is the question of—

The Court: Look at paragraph 11, where the plaintiffs, etc.—intervening third parties have the right to file objections to the settlement and the right to attempt to demonstrate at the fairness hearing that the relief provided in the settlement has an unreasonable or unlawful impact on them. What is an unreasonable or unlawful impact on them?

Mr. Sherwood: There are two cases that I cite, Judge, that tell you that. There is Setzer versus Novak Investment

Company, which says essentially—and picking up on the Weber decision, if you have a race-conscious remedy—

The Court: Which you never cite in here, incidentally.

Mr. Sherwood: Yes, I do, Judge.

The Court: Where do you cite Weber? The crucial paragraphs in here are the paragraphs beginning at 8 on page 12 and running through the end. The rest of it is all familiar class action stuff.

Mr. Sherwood: Judge, if you look at page 9, (23) paragraph A—I'm sorry, paragraph 9 on page 13. In Setzer, the En Banque Eighth Circuit said that where you have underrepresentation, that is enough to permit an employer to adopt race-conscious remedial measures.

And it is simply on the basis of statistics, Judge, not going to the question of what particular devices within the selection process caused that, but where you have conspicuous underrepresentation, that is enough. That is what Setzer says.

BDO versus Young says the same thing.

The Court: I wish it were all that simple. But apparently you felt compelled to write a lot more after paragraph 9-A. And apparently you were worried about some other qualifications to these rights to settlement.

The point is, I cannot tell at this point, I don't know, and I don't get a clear message from your papers whether or not the intervenors here do have the right to challenge your position that this test is unlawful; and challenge it with some kind of an evidentiary hearing. If that is the foundation for the claim of discrimination action in other words, they are really saying this is a house of cards: that here you have got a litigation, you have got a settlement, you have got a quota system where you have got a lot of white officers who will be waiting a year or two (24) longer for their appointments than they would have if this quota system didn't go into effect—all of this is founded on a

claim of a bad test. And they say, really, since this affects our rights, the plaintiffs can't get together with the State and agree that the test is no good; this affects us.

They could be totally wrong, but I frankly cannot tell it from what you said at the moment.

Mr. Rowley, we got to figure out a way to get through this issue. I don't want to prejudice you in any way. I want to tell you that in the first instance I will limit your briefing on this issue of the job-relatedness to the sole question of whether we should have a hearing. The record will be absolutely clear. You are not wasting anything by failing to put in a lot of affidavit on the facts, on the merits of the job-relatedness thing. I am telling you not to put in such affidavits now until you have demonstrated you have got a right to do that, because I don't want to just stumble into a factual inquiry on something which could be, if Mr. Sherwood is right, it is irrelevant.

At the same time, I don't want to preclude from arguing that it is very relevant and we should have a trial. What do you want to argue? So that is the way we are going to leave it. I will expect your papers a week from tomorrow.

Mr. Rowley: May I ask a question? I have no (25) problem with that if the briefs are all that is concerned in this one affidavit. I would like to see the materials that Mr. Hoots had, I may wish to comment on those and I'm certainly willing that any protective order that applies to Mr. Sherwood with respect to the examination apply to us.

The Court: Not at this point. I am giving you a week and a day to reply. I don't think I need to say it many more times. I will assume you are not replying to the merits of what Hoots says at this point.

Mr. Rowley: Do I know then that the Hoots affidavit is either withdrawn or not to be—

The Court: It is not withdrawn at all. I am just telling you that I want to take this in stages. What Mr. Sherwood

said is that the reason he put in the Hoots material is to argue in favor of stage 2 of the settlement, that is, replacing the present format of written tests with other contemplated selection methods, he is not putting in the Hoots affidavit to literally demonstrate the job-relatedness of the test for, you know, as such; and therefore, I am telling you, you don't need to address that point. You just tell me whether you are entitled to a hearing or a factual determination on the job-relatedness of the test or not.

Mr. Rowley: Are we entitled to assume then for (26) purposes of the brief, that the test is valid? This is what we understood from the last meeting, unless Mr. Sherwood raises all of these questions about the Hoots affidavit.

The Court: You keep raising things that you should not raise. I am not conceding that the test is valid. I think I threw that out as a possible format just to have that assumed. Nobody bought that. I don't think I need to repeat myself any more. You brief all the points that you wish to brief in response to Mr. Sherwood on the question of job-relatedness. You do not need to go into the merits.

At this stage you just brief the question of whether we should have a factual determination. Let's leave it at that. That brief of yours will be due on the 22nd. Thanks a lot.

Mr. Rowley: You want that filed here with proof of service?

The Court: Sure.

Ms. Butler: Your Honor, I have another matter before we leave.

Mr. Halberg: Your Honor, we haven't had an opportunity to have our position heard.

The Court: All right.

Ms. Butler: Fairly briefly, your Honor, I am informed that Mr. Walsh would—from Rowley's firm—without (27) discussing the matter with myself or without discussing it with anybody else from my office, called one of the

people who worked for the Department of Correctional Services directly yesterday to ask for some information about this settlement, and it caused a good deal of consternation at the Department. I was called at home late last night and had to function on it and I'd like the Court to direct Mr. Rowley and his firm that in the future not to talk to my client directly but to talk to them directly through myself or Miss Horowitz.

The Court: Did this occur?

Mr. Rowley: That was a conversation. We talked to the Department of Correctional Services about many cases constantly, because we have many cases with them, your Honor. If we are directed not to communicate with the Department on this case except through the Attorney General, we will indeed accede to that direction. However, I would like to point this out, your Honor, that the communications from the State of New York to us frequently in this case come through the Department of Correctional Services, not through the Attorney General. Come the other way around.

Ms. Butler: The last time that I had a direct communication with Mr. Rowley was July 28, after we had had our meeting and sent a copy of the proposed stipulation to (28) Mr. Rowley. At the end of that conversation Mr. Rowley said he would get back to me, and I haven't heard from Mr. Rowley since, so I think that should be clear on the record that when he talks about communication, he is not talking to me directly.

The Court: I would think communication would—be in the normal manner. Each attorney has his clients. You have your clients, they consist of some employees of the correctional department. You can certainly communicate with them to your heart's content. But to communicate with the department officially, I would assume you and your colleagues would go through the attorneys.

Mr. Rowley: I take it that counsel and other people from the Department will do the same, then even when they come around the other way, because we regard those as official communications, when we got a telephone call from Mr. Rodriguez, for example, who has been here in the court, counsel for the Department—

The Court: I don't think we need to spend a lot of time on it.

Mr. Rowley: We will follow that procedure, your Honor.

The Court: We better be formal. Do you have anything you want to add?

(29) Mr. Halberg: Yes, your Honor. We represent McClay and other intervenors. I was reading the record of the hearing on the 29th, and I am very troubled by the fact that your Honor has counseled all the intervenors in a lump. Mr. Rowley's clients and our clients. We have never had any participation in this case. And by speaking of intervenors generally, there are certain things that happened in July in Mr. Rowley's participation which your Honor can use as a basis for making certain rulings. We have not had any participation in this case at all.

For that reason—

The Court: I don't think that that is necessary to go into. Mr. Rowley's client did not agree to the settlement and no matter whether I felt it would have been more efficient to have the position made clear or not, there wasn't any agreement by his clients and so that's water over the dam. All intervenors have all their rights to object until the Court rules.

Mr. Halberg: Because one of our objections, that is in line with one of our objections, your Honor. We believe that this settlement cannot be approved without certain of the participation of our clients.

The Court: You are participating.

Mr. Halberg: In any settlement or in any further (30) proceedings because we are adversely affected.

The Court: You are participating now?

Mr. Halberg: Yes, your Honor. And one of the points will be the requirement that we participate—why the settlement should not be approved—

The Court: You can write that up when you want, but you are participating.

Mr. Halberg: At this point, yes.

The Court: Thank you very much.

Mr. Halberg: So we didn't participate in the drafting of the settlement.

The Court: You have a right to object.

Mr. Halberg: Which we are doing.

The Court: Thank you.

(Time Noted: 4:25 p.m.)